

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1482

In the United States Court of Appeals

For the Second Circuit

No. 77-1482

Bp/s

UNITED STATES OF AMERICA,

Appellee

vs.

HARRY FINEROW and LARRY PUTZER,
JOINED IN by Ray Adamiak *2/27*
Appellants

*Appeal From the United States District Court for
the Southern District of New York.*

BRIEF FOR APPELLANTS

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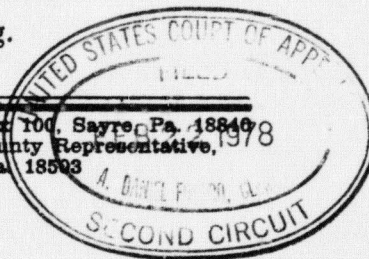


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Statement of Issue Involved

1

STATEMENT OF ISSUE INVOLVED

Are facts 5 to 7 months old sufficiently recent to
make a present finding of probable cause?

*Statement of Facts*STATEMENT OF FACTS

There are two (2) orders for electronic surveillance involved in the present case. The first was authorized by Judge Greisa of the United States District Court for the Southern District of N. Y. on December 30, 1976, and installed on January 5, 1977. The second was authorized by Judge Van Pelt Bryan of the same court on March 9, 1977.

The first wiretap order listed the telephone numbers which could be tapped and the following persons whose conversations were expected to be seized.

Telephone numbers listed were (914) 794-3244; (914) 794-8026; (914) 647-3442; (914) 647-3412; (914) 647-6691 and (914) 647-6358.

The following eight (8) persons were listed as those whose conversations were expected to be seized on the above six (6) telephones.

1. Robert Loewinger
2. Norman Wertheimer
3. An unknown female who answers telephone number (914) 794-3244
4. Sam Leventhal
5. Morris Melavsky
6. Harry Finerow
7. Lewis Frielich
8. Robert Hannon

Statement of Facts

The second wiretap order was issued by Judge Van Pelt Bryan on March 19, 1977. It listed the same persons as those contained in Judge Greisa's order of December 30, 1976, with the exception of Robert Hannon (the unknown telephone operator listed in the prior order was identified in the second order as Debra Sciolabra).

The only telephone listed in the second order, Judge Van Pelt Bryan's, was (914) 794-0960.

Subsequently, the following persons were indicted in a four count indictment charging violation of Title 18 U.S.C. 2, 371, 1084, and 1955. The persons so named were Robert Loewinger, Norman Wertheimer, Sam Leventhal, Harry Finerow, Lewis Freilich, Lawrence Putzer, Morris Melavsky, Mac Fenster, Ray Adomiak, William DeMase and Lester Fine.

Various pretrial motions were filed on behalf of the appellants which were denied. Whereupon the appellants Finerow and Putzer entered a plea of guilty to Count 2 of the indictment. Both were sentenced to 7 months imprisonment, 30 days of which were to be spent in a jail-like institution, the remaining 6 months were suspended; each was placed on probation for 3 years; and they were fined \$5000.00 and \$3500.00, respectively.

At the time the guilty pleas were entered both the government and the court agreed that the appellants' pretrial motions would be preserved for the purposes of appeal.

*Argument*ARGUMENT

I.

**Are Facts 5 to 7 Months Old Sufficiently Recent To Make
a Present Finding of Probable Cause?**

The application for search warrant (electronic surveillance) in this case is founded on Title 18 U.S.C. 1955 which requires, among other elements, that five (5) or more persons must be engaged in a gambling enterprise before it is a federal crime.

It is basic, therefore, that if four (4) or less persons engage in a gambling activity it is not a violation of this statute. The statute and case law *exclude bettors*, as among the five (5) persons necessary to violate Title 18 U.S.C. 1955. The five persons must be engaged in the *operation* of the gambling enterprise.

The first search warrant (electronic surveillance) in this case was authorized on December 30, 1976, by Judge Greisa of the United States District Court for the Southern District of New York. The following persons were named or identified as being engaged in this gambling operation in violation of Title 18 U.S.C. 1955.

1. Robert Loewinger
2. Norman Wertheimer
3. An unknown female who answers telephone number 914-794-3244 (hereinafter referred to as the "telephone operator")

4. Sam Leventhal
5. Morris Melavsky
6. Harry Finerow
7. Lewis Frielich
8. Robert Hannon

The above-named persons are listed in the application for search warrant (wiretap), the supporting affidavit and the court's order as being those against whom there is probable cause to believe that they are engaged in a gambling operation in violation of Title 18 U.S.C. 1955.

The above-named persons are so identified in the application for search warrant (wiretap) on pages 1, 2, 3, 6 and 7; in the supporting affidavit at pages 1, 2, 33, 34, 37, 39; and in the court order at pages 1, 2, and 4.

It is the government's contention that the above-named persons are engaged in *three* (3) separate gambling enterprises, with a sufficient connection, however, to constitute one overall gambling operation.

The government, on page 13 of the affidavit, denominates the first gambling operation as the "A. Loewinger Operation". The affidavit describes the "Loewinger Operation" from pages 13 through 17. The only persons named or identified in the "Loewinger Operation" are:

1. Robert Loewinger
2. Norman Wertheimer
3. Telephone Operator

The government, on page 17 of the affidavit, denominates the second gambling operation as the "B. Leventhal

Argument

Operation". The affidavit describes the "Leventhal Operation" from pages 17 through 24. The only person named or identified as part of the "Leventhal Operation" is:

4. Sam Leventhal

The government, on page 24 of the affidavit, denominates the third gambling operation as the "C. Melavsky Operation". The "Melavsky Operation" is described in the affidavit from page 24 to page 31. The four (4) remaining persons are listed as part of the "Melavsky Operation":

5. Morris Melavsky
6. Harry Finerow
7. Lewis Frielich
8. Robert Hannon

The affidavit, in support of the application for wiretap, on page 19, the first paragraph indicates that Confidential Informant A overheard conversations for laying-off wagers between Sam Leventhal and Norman Wertheimer. The conversations took place December 5, 1976, some 25 days before the wiretap was authorized. (Mr. Wertheimer was part of the "Loewinger Operation" and Mr. Leventhal operated alone). Even if we concede that this conversation was recent enough to make Mr. Leventhal part of the "Loewinger Operation" it only constitutes a four-man operation which is not a violation of Title 18 U.S.C. 1955 which requires that at least five persons be engaged in a gambling operation.

For the government to succeed in its theory that all eight persons named were involved, it must show a link

between the remaining 4 persons in the "Melavsky Operation" and the 4 persons in the "Loewinger-Leventhal Operations".

This they have failed to do.

There is only one reference, a single sentence, in the entire affidavit of some 39 pages which attempts to link the "Melavsky Operation" to the "Loewinger-Leventhal Operations". That reference is to be found on page 16, paragraph (c).

"Mr. B advised me that Melavsky told him during the summer of 1976 that he (Melavsky) lays-off with Loewinger on a regular basis."

We respectfully submit, that since the wiretap order was signed December 30, 1976, and installed in January of 1977, that information that in the summer of 1976 Melavsky laid-off bets with Loewinger is so stale as to be worthless.

The information in the affidavit which attempts to link the four (4) people in the "Melavsky Operation" with the four (4) people in the "Loewinger-Leventhal Operations" is five to seven months old. The summer of 1976 is when the information was received, but it was not until December 30, 1976, that it was acted upon.

The essential issue before the court is one of timeliness.

The proof of probable cause which must be made before a search warrant (electronic surveillance) may issue must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. *Sgro v. U.S.*, 53 S.Ct. 138. The re-

Argument

quirement that an affidavit for a search warrant state the time of the occurrence of the facts relied upon is based on the necessity that there exist at the time the warrant is issued probable cause for believing that the facts relied upon still continue to exist. *Sgro*, supra.

My research indicates that no case of this type in the history of the federal or state systems has ever held that a period of 5 to 7 months could justify the issuance of a search warrant for electronic surveillance. Indeed, A.L.R. 2nd Vol. 100, page 541 (1965)¹ paragraph (2) states:

"An interval of 2 months or more between act and affidavit *has always* been held such an unreasonable delay as to vitiate the ensuing search." (Emphasis added.)

This continues to be true, with one or two rare exceptions.

It is well established that stale information *cannot* supply the probable cause necessary for a search warrant.

The Supreme Court of Pennsylvania, in a recent case, *Commonwealth v. Eazer*, 455 Pa. 320, 312 A.2d 398, held that:

"In order for a search warrant to be constitutionally valid, the issuing officer must reach the conclusion that probable cause exists at the time he issues the warrant."

In the *Eazer* case, supra, a police undercover agent placed a 50¢ lottery bet with Eazer 61 days before the

¹ For collected cases see Annot. 100 A.L.R. 2d 525, 534-543 (1965).

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search warrant was issued. The court, in *Eazer*, said at pages 324 and 325:

"... A police officer's unsubstantiated impression that a particular crime is of the sort which usually is continuing is not sufficient; nor may a magistrate issue a warrant upon such an impression. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969).

... the question before us is whether the officer's report to the magistrate of the two month-old criminal act is too remote in time and certainty to provide the requisite existing probable cause necessary for the issuance of a search warrant. We hold that the probable cause demanded by the Fourth Amendment may not be established by such a stale allegation."

The Court, in *Eazer*, *supra*, went on to say, on page 326, that

"... '... once it is recognized that it is *possible* for the facts and circumstances to change with the passing of time, a redetermination of probable cause is constitutionally required.' ..."

It may be true that the affidavit in this case shows continuing gambling activity, but this in and of itself is not sufficient. Local gambling activity, absent 5 persons, is not a violation of this statute, 18 U.S.C. 1955. If the gambling activity shown by the affidavit contains less than 5 people in a single gambling enterprise, it lacks the requisite probable cause necessary for the issuance of a search warrant (electronic surveillance) as required by the Fourth Amendment and Title 18 U.S.C. 2518(3) (a).

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The probable cause demonstrated by this affidavit establishes, at best, two separate and distinct 4-man gambling operations, neither of which is sufficient to enable the court to issue a wiretap for a violation of Title 18 U.S.C. 1955, which statute requires a minimum of 5 or more persons.

A listing of individual cases and the permissible lapse of time from act to the issuance of the search warrant would serve no useful purpose. Suffice it to say that no case in the history of the country has ever held that information 5 to 7 months old is sufficient to make a constitutional finding that probable cause presently exists and thus enable the court to issue a constitutional order for wiretap.

The 5 to 7 month lapse of time is particularly pernicious in the case of gambling. The constantly shifting sands of a gambling operation, with its causal contacts and tentative relationship, by its very nature, mitigates against the concept that stale information, 5 to 7 months old, may be used to make a present finding of probable cause.

We respectfully submit that the affidavit in this case lacks the probable cause required by the Fourth Amendment of the Constitution of the United States and Title 18 U.S.C. 2518(3) (a) and that, therefore, all evidence acquired by this wiretap must be suppressed and may not be used in any future proceeding.

SUMMARY

The government, in the case at bar, has demonstrated two separate gambling operations of four persons each.

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This doubtless constitutes a violation of local gambling statutes but not of federal law and in particular of Title 18 U.S.C., Section 1955.

The court in *U.S. v. Marrifield*, 515 F.2d 877 (5th Cir. 1975) said:

"... a warrant secured for violation of Section 1955 must be based on probable cause to believe that federal and not merely state law is being violated."

Since the only connecting link between two separate and distinct four-person gambling operations is based on information some 5 to 7 months old, the rule laid down in *Eazer*, supra, becomes applicable:

"... '... once it is recognized that it is *possible* for the facts and circumstances to change with the passing of time, a redetermination of probable cause is constitutionally required.' ..."

We submit that whatever relationship existed 5 to 7 months prior to the approval of the December 30, 1976 wiretap, information that stale is insufficient to make a finding of probable cause 5 to 7 months later that the earlier relationship still exists.

We further submit that since the December 30 wiretap lacks the necessary probable cause all evidence acquired thereby must be suppressed and not used in any further proceeding. And since the March 9, 1977 wiretap is based almost exclusively on information acquired through the December 30 wiretap, evidence derived therefrom must also be suppressed.

Respectfully submitted,
THOMAS J. HANLON,
Attorney for Appellants.

A F F I D A V I T

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Dated: February 16, 1978

Alta Furma

Sworn to and subscribed before me this 16th day of February 1978

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